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SERVICE DATE - DECEMBER 13, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-486 (Sub No. 3X)

KYLE RAILROAD COMPANY–DISCONTINUANCE EXEMPTION–IN MARSHALL,
WASHINGTON, AND CLOUD COUNTIES, KS

STB Docket No. AB-33 (Sub-No. 155X)

UNION PACIFIC RAILROAD COMPANY–ABANDONMENT EXEMPTION–
IN MARSHALL, WASHINGTON, AND CLOUD COUNTIES, KS

Decided: December 12, 2000

By a joint petition filed August 25, 2000, Kyle Railroad Company (Kyle) and Union Pacific Railroad Company (UP) (collectively, petitioners) seek an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to permit UP to abandon, and Kyle to discontinue service over, a 60.12 mile¹ line of railroad known as the Frankfort Branch, extending from milepost 409.1 near Frankfort to milepost 472.0 at Ames, in Marshall, Washington, and Cloud Counties, KS.² We will grant the exemption, subject to an historic condition, environmental conditions, and standard employee protective conditions.

BACKGROUND

UP owns the Frankfort Branch and Kyle operates it pursuant to a lease.³ Petitioners state that the line has traditionally served the agricultural community of northern Kansas. According to petitioners, the Frankfort Branch is a difficult line to operate because it is intersected by no other railroad lines and connects with the national rail system only via Kyle's connection with

¹ Petitioners state that a milepost equation of 421.10=423.88, near Blue Rapids, KS, makes the line 2.78 miles shorter than the terminal mileposts would otherwise indicate.

² Notice of the filing was served and published in the Federal Register on September 14, 2000 (65 FR 55676).

³ UP acquired the line from the Missouri Pacific Railroad Company in 1982. See Union Pacific – Control – Missouri Pacific; Western Pacific, 366 I.C.C. 462 (1982). As UP had its own lines through northern Kansas paralleling those of MP, UP leased the Frankfort Branch to Kyle in 1991. See Kyle R.R. Co. – Lease and Trackage Rights – Missouri Pacific R.R. Co. and Union Pacific R.R. Northern Kansas Rail Lines, ICC Finance Docket No. 31754 (ICC served Apr. 5, 1991).

UP at Salina. All traffic originating or terminating on the line must therefore move over much of its 60-mile length. Petitioners assert that declining grain shipments on the line destined to overseas markets, increasing amounts of corn and milo consumed by nearby ethanol plants served by trucks, and direct trucking of grain to UP railheads have left Kyle with insufficient traffic and revenues to sustain the line.

Petitioners state that the segment of the Frankfort Branch to be abandoned serves 10 stations, none of which has served more than 2 shippers for the past 3 years. Petitioners also submit that the abandonment and discontinuance would affect no more than six shippers, and affect them only minimally. These shippers are Beattie Farmers Union Cooperative, Farmers Coop Grain Association, Farmers Coop Shipping Association, Farmers Coop Elevator Association, Palmer Grain, and Boettcher Enterprise.⁴ According to petitioners, in 1999, inbound and outbound traffic for these six shippers totaled only 116 shipments generating revenues of \$60,207, while avoidable costs for the same period were \$214,123.⁵ Finally, petitioners state that shippers have available to them, as alternative transportation, rail service at nearby railheads, as well as truck service over Kansas Highway 9.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned and operations may not be discontinued without prior Board approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from an abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of an abandonment and discontinuance application, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving petitioners of the costs of owning, maintaining, and operating the line [49 U.S.C. 10101(5), and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

⁴ Petitioners assert that A&K Railroad Materials (A&K) should not be regarded as a shipper situated on the Frankfort Branch as the 24 carloads A&K shipped in 1997 and 1998 were rail, ties and other track materials removed from another abandoned railroad line.

⁵ In 1997, 171 carloads moved over the line generating revenues of \$79,081 and costs of \$233,413; in 1998, 176 carloads moved over the line generating \$65,113 in revenues and \$224,725 in costs.

Regulation of the transaction is not necessary to protect shippers from an abuse of market power. The six affected shippers on the line have not objected to the proposed abandonment and discontinuance, have made minimal use of rail service, and appear to have adequate transportation alternatives available to them.⁶ Nevertheless, to ensure that the shippers are informed of our decision, we will require petitioners to serve a copy of this decision on each shipper within 5 days after the service date of this decision, and to certify to the Board that they have done so.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, we will impose the employee protective conditions in Oregon Short Line R. Co. – Abandonment – Goshen, 360 I.C.C. 91 (1979), as a condition to granting this exemption.

Petitioners have submitted a combined environmental report with their petition, and have notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed action. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on October 25, 2000.

In the EA, SEA noted that the Kansas State Historic Preservation Officer (SHPO) has indicated that the bridge located at milepost 471.4 is eligible for listing in the National Register of Historic Places. Therefore, SEA recommended that a condition be imposed on any decision granting abandonment/discontinuance authority requiring petitioners to retain their interest in, and take no steps to alter, the historic integrity of the bridge located at milepost 471.4 until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470(f).

SEA also noted that the Kansas Department of Health and Environment (Kansas DH&E) has indicated that the proposed abandonment/discontinuance and salvage of the 60.12-mile rail line are likely to threaten Kansas water resources, and may require a Kansas DH&E water quality certification. Therefore, SEA recommended that, prior to abandonment/discontinuance and salvage of the 60.12-mile rail line, petitioners further consult with Kansas DH&E to: (1) develop a Nonpoint Source Pollution Control Plan, and (2) determine if a Kansas DH&E water quality certification is required.

Subsequent to the issuance of its EA, SEA recommends that two new conditions be imposed based on further investigation and consultation with the U.S. Fish and Wildlife Service

⁶ Given our market power finding, we need not determine whether the proposed abandonment and discontinuance is limited in scope.

(FWS) and the U.S. Army Corps of Engineers (Corps). The FWS has not yet completed its review of the proposed abandonment and discontinuance. Therefore, SEA recommends that a condition be imposed prohibiting petitioners from salvaging or disposing of the entire right-of-way until completion of the section 7 process of the Endangered Species Act, 16 U.S.C. 1531. Similarly, the Corps has also not yet completed its review of the proposed abandonment and discontinuance. SEA therefore recommends that a condition be imposed requiring petitioners to further consult with the Corps prior to abandonment and salvage of the right-of-way to determine if: (1) the proposed project is consistent with applicable Federal, state, and local water quality standards, and (2) permits are required under section 404 of the Clean Water Act.

No comments to the EA were filed by the November 23, 2000 due date. We will impose the conditions recommended by SEA. Based on SEA's recommendations, we conclude that the proposed abandonment and discontinuance, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

SEA states that, following the abandonment/discontinuance, the right-of-way may be suitable for other public use under 49 U.S.C. 10905. We note, however, that no one has sought a public use condition, and none will be imposed.⁷

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment of UP's line described above, and the discontinuance of service thereover by Kyle, subject to the employee protective conditions set forth in Oregon Short Line R. Co. – Abandonment – Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that petitioners: (1) shall retain their interest in and take no steps to alter the historic integrity of the bridge located at milepost 471.4 until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470(f); (2) shall consult with the Kansas DH&E as discussed above; (3) shall not salvage or dispose of the entire right-of-way until completion of the section 7 process of the Endangered Species Act, 16 U.S.C. 1531; and (4) shall consult with the Corps prior to abandonment and salvage of the right-of-way as discussed above.

2. Petitioners must serve a copy of this decision on the line's shippers within 5 days after the service date of this decision, and certify to the Board that they have done so.

⁷ Public use requests were due no later than 20 days after publication of the notice of the petition in the Federal Register, or by October 4, 2000.

3. An offer of financial assistance (OFA) under 49 CFR 1152.27(c)(1)⁸ to allow rail service to continue must be received by petitioners and the Board by **[10 days after service date]**, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by a \$1,000 filing fee. See 49 CFR 1002.2(f)(25).⁹

4. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

5. Provided no OFA has been received, this exemption will be effective on **[30 days after service date]**. Petitions to stay must be filed by **[15 days after service date]**, and petitions to reopen must be filed by **[25 days after service date]**.

6. Pursuant to the provisions of 49 CFR 1152.29(e)(2), UP shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by UP’s filing of a notice of consummation by December 13, 2001, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary

⁸ See Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537 (STB served Dec. 24, 1996, and June 27, 1997).

⁹ The Marshall County Railroad Historical Society, Waterville, KS, notified the Board by letter filed September 29, 2000, that it was interested in acquiring a portion of the line for an excursion and tourism operation. However, as the proposal is not for continued rail freight service, such operations fall outside the Board’s regulatory jurisdiction. See, e.g., The Atchison, Topeka and Santa Fe Railway Company—Abandonment Exemption—In Atchison County, KS, Docket No. AB-52 (Sub-No. 79X) (ICC served Apr. 13, 1995).